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No. 84-____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

JOANN MORGAN,

*Petitioner,*

VS.

FIRESTONE TIRE & RUBBER COMPANY,

*Respondent.*

**Petition For Writ of Certiorari To the United States Court of Appeals for the Eleventh Circuit.**

## WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) WHETHER THE FEDERAL RULES OF EVIDENCE REQUIRE A FOUNDATION OF SIMILARITY BETWEEN AN OUT-OF-COURT EXPERIMENT AND EVENTS IN LITIGATION BEFORE THE TRIAL COURT HAS DISCRETION TO ADMIT THE OUT-OF-COURT EXPERIMENT INTO EVIDENCE.

## PARTIES TO THE PROCEEDING

Petitioner, Joann Morgan

Respondent, Firestone Tire & Rubber Company

Andrew J. Ryan, III, Esquire Richard H. Middleton, Esquire Eugene C. Brooks, Esquire Middleton & Anderson, P.C. Attorneys for Petitioner

Charles Stapleton, Esquire Martin, Snow, Grant & Napier Attorneys for Respondent

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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JOANN MORGAN,

*Petitioner*,

VS.

FIRESTONE TIRE & RUBBER COMPANY,

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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### STATEMENT OF JURISDICTION

(a) Joann Morgan petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit. Petitioner seeks the determination of a federal evidentiary issue in which the Circuits are in conflict. Rule 17.1(a), Rules of the Supreme Court of the United States. The original action was filed in the U.S. District Court for the Southern District of Georgia as a wrongful death products liability diversity action. Federal jurisdiction exists under 28 U.S.C. § 1332 (1982).

(b) Judgement of the trial Court was entered on June 28, 1984 by the U.S. District Court for the Southern District of Georgia. A per curiam opinion upholding the trial Court was entered on March 1, 1985 by the United States Court of

Appeals for the Eleventh Circuit. (App. at 1a). Appellant's Petition for Rehearing and Suggestion For Rehearing En Banc were denied on April 5, 1985. (App. at 2a). The Notice of Appeal was filed on April 25, 1985 in the United States Court of Appeals for the Eleventh Circuit. (App. at 4a).

(c) This petition is brought pursuant to 28 U.S.C. 1254(a) which confers jurisdiction on the Supreme Court of the United States and Rule 17.1(a) of the Rules of the Supreme Court of the United States which provides for grant of a writ of certiorari to review conflicts between the U.S. Courts of Appeal.

## STATUTES INVOLVED

**Federal Rules of Evidence,**

**Rule 401**
**Definition of "Relevant Evidence"**

"Relevant Evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

**Rule 402.**
**Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

**Rule 403.**
**Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of (1)

unfair prejudice, (2) confusion of the issues, (3) misleading the jury, or (4) by considerations of undue delay, (5) waste of time, or (6) needless presentation of cumulative evidence.

## STATEMENT OF THE CASE

Petitioner's husband died on January 4, 1982 at the age of 37, leaving his wife and five daughters. T. at 103-26, 331. Decedent owned a trucking business and was driving one of his trucks loaded with eggs from a processing facility outside of Savannah, Georgia to retail outlets in Savannah. T. at 118-19. The front left tire of the truck blew out after driving approximately 17 miles, causing decedent to lose control and crash into a ditch. T. at 80. The load of eggs fell forward and crushed him to death. T. at 86-89.

Petitioner filed this diversity action in the U.S. District Court. R. 1-8. She alleged that a defect in the tire caused the tire blow-out that caused her husband's death. *Id.* The tire had been manufactured by Seiberling, a subsidiary of Firestone Tire & Rubber Company ("Firestone"). R. 65-66. Firestone, an Ohio Corporation, was named as Defendant. *Id.*

Petitioner's tire expert testified that the blow-out was caused by a defect in the tire which had existed since its manufacture. T. at 208-13. The tire was a Load Range E, Seiberling 4-ply tube type truck tire, size 8.25-10 manufactured in 1978. T. at 207. The defect consisted of foreign matter within the plies of the tire that caused the nylon cords in the plies to heat up, weaken and eventually give way. The continued heating of the cords culminated in the blow-out at the place of contamination. T. at 210.

Respondent's expert testified that the blow-out was caused by chronic underinflation. T. at 374. This chronic underinflation caused the inside cords of the tire to loosen

and fall away from the inside of the tire. T. at 359-62. The tire eventually blew out as the cords weakened. *Id.*

Another expert who had originally been appointed by the Court was called by the Respondent. He agreed with Respondent's first expert. T. at 485.

In support of the testimony of Respondent's first expert, Firestone showed a videotaped film of an out-of-court experiment in which a different tire was blown out under differ ent circumstances. Respondent's Exhibit No. 31; T. at 386, 404. The test tire was also exhibited to the jury. Respondent's Exhibit No. 27, T. at 403-04. This test tire was quite different from the tire in litigation and the differences are set forth below:

| *Petitioner's Tire in Litigation* | *Respondent's Test Tire* |
|---|---|
| 1. Manufactured by Seiberling in 1978. | 1. Manufactured by Dayton in 1984. |
| 2. An older tire which had used 70% of its tread. | 2. A brand new tire that had been run 100 miles just prior to the experiment. |
| 3. 4-ply tire. | 3. 6-ply tire, (50% more ply). |
| 4. Size 8.25-10. | 4. Size 8.25-20 (2 sizes larger). |
| 5. Max. load of 4,000 lbs. | 5. Max. load of over 6,000 lbs. |
| (T. at 207, R. 65-66) | (T. at 388-97) (Respondent's Exhibit No. 27) |

The out-of-court experiment was conducted under circumstances completely different from the facts in litigation. These differences are set forth below:

| *Events in Litigation* | *Circumstances of Respondent's Experiment* |
|---|---|
| 1. Puncture caused by interior condition. | 1. Puncture caused by exterior blade. |
| 2. Medium size truck fully loaded with eggs in trailer. | 2. Large truck with empty trailer. |
| 3. Flattened tire went 100 yards through pot holes and crashed into a ditch 6 feet deep. | 3. Flattened tire went 300 yards on smoothly paved asphalt surface. |
| 4. Drive by David Morgan. | 4. Driven by Firestone employee. |
| 5. Drizzling day in January. | 5. Bright, clear, dry day. |
| (T. at 51-56, 80-84) | (T. at 388-97, Respondent's Exhibit No. 31) |

The purpose of Firestone's out-of-court experiment was to impeach Petitioner's theory of the tire defect. R. Vol. 3 at 9; T. at 383, 385-87, 396-97, 409-10, 458. The impeachment centered on the cause of the loose cords on the tire's inside ply next to the tube. R. at 240, 254-56. Petitioner's expert attributed these loose cords to the run flat damage caused by the weight of the truck bearing down on the tire as it went through a parking area full of pot holes. *Id.* Respondent's expert attributed the loose cords to the chronic underinflation of the tire. T. at 385-87.

In the experiment, the test tire was flattened. It was then run on a flat surface without a fully loaded truck bearing down upon it. T. at 388-97. The test tire had no loose cords on the inside of the tire after the experiment. T. at 409-10.

Respondent then claimed proof that the loose cords of the tire in litigation were not the result of run flat damage. T. at 383, 385, 396-97. Relying on these test results, Respondent concluded that the loose cords were caused by underinflation, that underinflation existed, and that, therefore, the blow-out was the result of the underinflation. T. at 385-87, 396-97, 409-10, 458.

Petitioner objected to the admission of the test tire and the videotape of the out-of-court experiment at the Pretrial Conference. R. Vol. 3 at 7-8. The Court delayed ruling. *Id.* at 13-14. On the eve of trial, Petitioner filed a Motion In Limine. R. at 287. During trial, Petitioner raised an objection when Respondent's expert referred to the experiment. T. at 404. Petitioner's objection was based on the lack of similarity between the test tire and out-of-court experiment with the tire and facts in litigation. *Id.*

The Court then viewed the video and voir dired the three trial experts. T. at 388-94. Petitioner's expert explained the major dissimilarities that caused the out-of-court experiment to be misleading. They are as follows:

(1) the test tire was brand new while the subject tire had worn approximately 70% of its tread, therefore, the rubber surrounding the test tire cords was new and less likely to fall away from the cords while the rubber in the tire in litigation was older and more likely to fall away from the cords; T. at 398-401.

(2) the test tire contained more plies and had a thicker tread than the subject tire which provided more protection from the rim crush; *Id.*

(3) the road surfaces over which the tires were run flat were vastly different and caused different results. *Id.*

Respondent's first expert, Mr. Gardner, stated that the dissimilarities made no difference. T. at 397. Mr. Baker, the second expert called by Respondent, stated that the experiment would increase the jury's understanding but noted that the jury should be made aware of the dissimilarities. T. at 401-02. Respondent laid no foundation or made any showing that the out-of-court experiment and test tire were similar to the facts in litigation.

The Court allowed the video into evidence and allowed the test tire to be exhibited to the jury. T. at 404. A cautionary instruction was given to the jury. T. at 405. No ruling of similarity was ever made.

## REASONS FOR GRANTING THE WRIT

The Circuits of the U.S. Courts of Appeals are in disarray over this federal evidentiary issue. The issue is whether a foundation of similarity must be laid before evidence of out-of-court experiments may be considered for admission into evidence. The Eighth Circuit has recently overturned a Plaintiff's verdict against Firestone because the trial Court allowed Plaintiff to show the jury a video of an out-of-court experiment of dissimilar events. *Hale v. Firestone Tire & Rubber Co.*, 756 F.2d 1322, 1333 (8th Cir., 1985).

*Hale* involved personal injury to the Plaintiff, the owner of a trucking company, which occurred when he was inflating a truck tire. *Id.* Plaintiff suffered severe injury to his face and hand when the rim of the wheel on which the tire was mounted separated. The rim was manufactured by Firestone and Plaintiff alleged that it was defective. During trial, Plaintiff informed the jury of two hundred and ten wheel rim injuries involving the same type rim and showed the jury a motion picture of a tire rim accident to demonstrate the force of the explosion. *Hale*, 756 F.2d at 1332-33.

In *Hale*, Firestone objected because the prior accidents reported to the jury and the events in the film were dissimilar to the facts in litigation. *Id.* In regards to the prior accidents, the Court held that the similarities were insufficient as a matter of law, even though the wheel rim in litigation was the same type of wheel rim involved in the prior accidents. *Hale*, 756 F.2d at 1332. The Eighth Circuit stated that "[e]vidence of prior accidents is admissible only if the proponent of the evidence shows that the accidents occurred under circumstances substantially similar to those at issue in the case at bar". *Hale*, 756 F.2d at 1332. The rationale of dissimilarity was also relied upon to bar the motion picture from evidence. *Id.*

The Eighth Circuit pointed to many dissimilarities between the circumstances of the motion picture and the facts in litigation. These dissimilarities are as follows: (1) the rim in the film was not the specific type rim in litigation; (2) the manufacturer of the rim in the film was not shown to be Firestone; (3) the rim in the film had been altered; (4) the inflation of the tire in the film was 80-90 p.s.i. while the tire in litigation was inflated to no more than 55 p.s.i.; (5) the rim in the film had a split ring while the rim in litigation had a continuous ring; and (6) the tire in the film was laying on the ground while the tire in litigation was mounted on a truck. *Hale*, 756 F.2d at 1333. Referring specifically to experimental evidence, the Eighth Circuit stated " [e]vidence of experimental tests is not admissible unless a foundational showing is made that the tests were conducted under conditions substantially similar to actual conditions." *Id.* at 15-16.

The Fourth Circuit ruled likewise in overturning a verdict for General Motors. *Gladhill v. General Motors Corp.*, 743 F.2d 1049, 1051 (4th Cir. 1983). The Fourth Circuit found that General Motors had shown a video of an out-of-court experiment conducted under dissimilar circumstances

which caused the evidence to be "irrelevant if not misleading." *Id.* at 1051. Plaintiff claimed his car's brakes malfunctioned on a curve and caused him to skid and collide into a utility pole. Defendant showed a video of the same model car's brakes locking on a straightaway with a test driver in control. *Gladhill*, 743 F.2d at 1051. General Motors submitted the evidence only for demonstrative purposes. *Id.* The Fourth Circuit noted that any evidence could be labeled demonstrative and held that the prejudicial effect of the video, due to the dissimilarity between the test and the facts in issue, outweighed the probative value of the evidence. *Id.* at 1052. The trial court was reversed. *Id.*

In a conflicting decision, the First Circuit has ruled that the dissimilarity of out-of-court experiments goes to the weight rather than the admissibility of the evidence. *Szeliga v. General Motors Corp.*, 728 F.2d 566, 567 (1st Cir., 1984). In *Szeliga*, General Motors showed two video films of dissimilar vehicles striking an object in a manner dissimilar to the facts in litigation. *Id.* The facts are straightforward. Plaintiff's car went off the road, struck a culvert and crashed into a group of trees. *Id.* Plaintiff claimed that the left front wheel disconnected from the axle and caused the accident. *Id.* General Motors claimed that Plaintiff carelessly ran into the culvert and knocked the wheel off. General Motors showed a film of a wheel and wagon assembly hitting a cement barrier to illustrate expert testimony. *Id.* In the film the wheel was knocked off when it smashed into the cement. *Id.*

The Eleventh Circuit did not explain its rationale for upholding the trial Court's admission of evidence without requiring similarity. However, it has implicitly followed the *Szeliga* rule. The seeming arbitrariness of the Courts on this issue leaves every litigant in limbo on this increasingly crucial point of evidence. With the Circuits on their diverg-

ing paths, a writ should issue to clarify this federal evidentiary matter.

**I. Relevancy Requires a Foundation of Similarity**

The Federal Rules of Evidence require that evidence be relevant and that it outweigh dangers of prejudice, confusion or waste of time. FED. R. EVID. 401, 402, 403. These rules have received various interpretations from the Circuits regarding the admissibility of evidence of out-of-court experiments. The liberal interpretation of *Szeliga* allows a litigant to put any experiment, no matter how remote, into evidence. *Hale* and *Gladhill* require the experiment to have substantial similarity with the facts in litigation.

The test of similarity is grounded in relevancy. 11 J. MOORE, MOORE'S FEDERAL PRACTICE, 703:30 (1982). The federal rules require relevancy. FED. R. EVID. 402. The simplest and most logical way to ensure compliance with the rules is to require the admitting party to law a foundation of similarity. *Hale*, 756 F.2d at 1332-33. Foundations are commonplace thresholds which must be satisfied before evidence may be considered for admissibility. E. IMWINKELRIED, EVIDENTIARY FOUNDATIONS (1980).

In the case at bar, Firestone would be required to show that the test tire and the circumstances of the experiment were similar to the tire and facts in litigation. This showing allows the Court to consider relevancy. This requirement is not burdensome and quickly narrows the opportunity for abuse of the federal evidentiary rules.

**II. Disuniformity of Opinions from the U.S. Courts of Appeal Have Destroyed Valid Judicial Discretion**

Evidence is often a discretionary matter for the trial Court. 1 J. WEINSTEIN & M. BERGER, WEIN-

STEIN'S EVIDENCE, 403 [05] at 403-09 (1983). However, judicial discretion requires guidance by fixed legal principles and precedents. 1 WIGMORE, EVIDENCE § 16 at 310 (Chadbourn rev. 1979). If legal principles and precedents are not followed, then discretion gives way to arbitrariness.

The circuits have dealt with this evidentiary issue in various ways. Some circuits have allowed dissimilar experiments as illustrative evidence but bar them as reconstructions of the facts in litigation. *Barnes v. General Motors Corp.*, 547 F.2d 275, 276, 277 (5th Cir. 1977) (barred as reconstruction); *Young v. Illinois Central Gulf R. Co.*, 618 F.2d 332, 337-38 (5th Cir., 1980) (allowed as illustrative); *Miller's National Ins. Co. v. Wichita Flour Manufacturing Co.*, 257 F.2d 93, 99 (10th Cir., 1958) (allowed as illustrative); *Jackson v. Fletcher*, 647 F.2d 1020, 1026-28 (10th Cir., 1981) (barred as reconstruction).

The opinions have created a dichotomous approach to the issue which can be confusing. In *Young*, the Fifth Circuit noted the many similarities between the submitted motion picture and the facts in litigation and allowed the motion picture as illustrative evidence. *Young*, 618 F.2d at 337-38. The Tenth Circuit has allowed a motion picture to illustrate a physical principle upon which causation hinged. *Miller National*, 257 F.2d at 99. This motion picture showed an explosion of a structure, the cause of which was the central issue. *Id.* However, in *Barnes* and *Jackson*, the evidence of out-of-court experiments closely resembling the facts in litigation was barred because dissimilarities caused the evidence to be irrelevant and misleading. *Barnes*, 547 F.2d at 277; *Jackson*, 647 F.2d at 1026-28.

Prior to the *Hale* decision, the Eighth Circuit was also following this dichotomous path. *Randall v. Warnaco, Inc.*,

*Hirsch-Weiss Div.*, 677 F.2d 1226, 1234, n. 7 (8th Cir., 1982). In *Randall*, the Defendant introduced a videotaped experiment of a camping accident. *Id.* The Court voiced concern with the video tape's admissibility even though objection had been waived. *Id.* The Court explained its understanding of the dichotomy and apparently would have barred the evidence if an objection had been made. *Id.*

The Fourth Circuit has refused to recognize the dichotomy in *Gladhill*, 743 F.2d at 1051. It quickly pointed out the semantic game that was being played by litigants. *Id.* at 1051. The Eighth Circuit has now followed the Fourth Circuit and is requiring substantial similarity of out-of-court experimental evidence. *Hale*, 756 F.2d at 1332-33. The Eleventh Circuit has not articulated its rule. With so many differing solutions to the issue, the Eleventh Circuit may feel that there is no need to create yet another one.

Petitioner asserts that one federal rule is good enough for all litigants. The *Hale* decision was decided and filed three weeks prior to the Eleventh Circuit's denial of Petitioner's rehearing. It is puzzling why Firestone should be treated differently on the same evidentiary issue in two different circuits. *Hale*, 756 F.2d at 1332-33; *Morgan v. Firestone Tire and Rubber Co.* No. 84-8569 (11th Cir. April 4, 1985). The answer to the puzzle is that no rule of admissibility now exists and discretion has given way to arbitrariness.

### III. Conflicting Interpretations of Federal Rules of Evidence 401, 402 and 403 Adversely Affect Judicial Economy and Uniformity of Federal Law.

The Eleventh Circuit, following *Szeliga*, and the Eighth Circuit, in *Hale*, have adopted conflicting constructions of the Federal Rules of Evidence. No policy favors further "percolation" of the doctrine in the Courts of Appeal. On the contrary, continuing conflict in interpretation of the Federal

Rules will result in judicial expense and prejudice to parties from disuniform application of federal law.

As Justice Walter V. Schaefer (retired) has noted, the need for judicial uniformity underlies the judicial Article of the Constitution. W. Schaefer, "Reducing Circuit Conflicts", 69 ABA J. 452, 453 (1983). Particular litigants suffer injury to their legal rights until conflict between circuits is resolved, because the conflict results in improper or incorrect application of federal law to some litigants. *See Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816) (Story, J.) (conflicting interpretations of federal law by state courts cause injustice to individuals and society). In addition, the continuation of a conflict adds to the burden of litigation in circuits where federal evidentiary law has not yet been construed with respect to experimental evidence.

Of course, some conflict between courts may be favorable to development of legal doctrine. *United States v. Mendoza*, ____ U.S. ____, 78 L Ed 2d 379, 104 S. Ct. ____, No. 82-849, slip op. at 6 (U.S. Jan. 10, 1984); *see also United States v. Stauffer Chemical Co.*, ____ U.S. ____, 78 L Ed 2d 388, 104 S. Ct. ____, No. 82-1448, slip op. at 4-5 (U.S. Jan. 10, 1984) (White, J., concurring) . In the present case, however, the conflict is ripe for resolution. The First Circuit adopted one interpretation of the Federal Rules in *Szeliga*. One year later, the Eighth Circuit advanced a conflicting interpretation in *Hale*. The Eleventh Circuit disregarded *Hale*, apparently rejecting the development in legal doctrine that *Hale* had advanced.

Further intercircuit conflict will not promote wise adjudication of this issue. On the contrary, further conflict will lead to unnecessary litigation in the remaining Courts of Appeal, and to disuniformity of federal law prejudicial to litigants.

## IV. The Logic of Evidence Requires A Foundation of Substantial Similarity

Wigmore has addressed the need for substantial similarity between experimental evidence and issues in litigation. WIGMORE, *supra.* at § 33. This authority has noted that legal proof is always inductive, and the quality of the fact finder's inductions depends on the evidence presented to it. *Id.* Wigmore requires that tests for admissibility of evidence "secure a fair probability for the claimed hypothesis as against and in competition with other claimed ones." *Id.* at 423.

Wigmore sets forth two methods of inductive proof: (1) Method of Agreement and (2) Method of Difference. *Id.* at § 33. In the method of agreement, a litigant trying to prove that "a" is the cause of the effect "b", may show that when "$a^1$", "$a^2$", and "$a^3$" occur, "$b^1$", $b^2$", and "$b^3$" also occur. *Id.* at 422. In the method of difference, a litigant trying to prove that "x" is the cause of "b", may demonstrate that when "x" occurs, "$b^1$", "$b^2$" and "$b^3$" occur and when "x" does not occur, then "c" and "d" occur. *Id.* at 422-23. With a quick application of inductive logic, the litigant may use the above methods to aid in his proof. However, substantial similarity between the "a" and "x" in litigation and the "a" and "x" of the experiments is essential to the admissibility of the evidence. *Id.*

The jurors will learn something from any out-of-court experimental evidence. However, the law of evidence regularly excludes evidence which increases knowledge that is irrelevant, misleading and unduly prejudicial. FED. R. EVID. 402, 403. Evidentiary law controls the knowledge that is imparted to jurors. Without this control, the inductive reasoning that the jury must make is skewed and unreliable. The simple solution to this danger posed by experiment evidence is to require substantial similarity.

Petitioners are not asserting that every experiment submitted to illustrate or support expert testimony must be

performed under circumstances identical to the facts in litigation. The proposed requirement is only for substantial similarity. The reliability of these experiments must be of concern. The easy and frequent use of videotapes portends the frequent use of out-of-court experiments in criminal as well as civil suits. The use of experimental evidence in an increasingly scientific society is attractive to all litigants. The videotaping of such experiments to support theories and the submission of materials used in the experiment as evidence is no doubt valuable to a jury. However, this Court must establish some uniform evidentiary rule so that true judicial discretion can be exercised in federal proceedings.

## CONCLUSION

The Circuits of the U.S. Court of Appeals are in conflict on this federal issue. As a result, litigants in federal trial Courts are facing varied interpretations of federal evidence law. The varied interpretations belie the existence of any uniform principle or precedent. Without a uniform legal principle or precedent from which to rule, neither uniform treatment nor judicial discretion is possible. Arbitrariness then fills the void and begets injustice.

Petitioner respectfully requests this Honorable Court to issue a writ of certiorari to consider this federal evidentiary issue based on its authority to review conflicts between the U.S. Courts of Appeal. In resolving these conflicts, Petitioner respectfully requests this Honorable Court to establish a requirement that the submitting party lay a foundation of substantial similarity before evidence of out-of-court experiments may be considered for admissibility.

Respectfully submitted,

ANDREW J. RYAN, III

RICHARD H. MIDDLETON, JR.

EUGENE C. BROOKS

*Attorneys for Petitioner*

# APPENDIX

## APPENDIX A

## IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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**No. 84-8569**

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JOANN H. MORGAN, Individually,
and as ADMINISTRATRIX of the
ESTATE OF DAVID W. MORGAN,
Deceased,

*Plaintiff-Appellant,*

VERSUS

FIRESTONE TIRE AND RUBBER COMPANY,

*Defendant-Appellee.*

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**APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA**

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(March 1, 1985)

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS*, District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 25.

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*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

**APPENDIX B**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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**No. 84-8569**

---

JOANN H. MORGAN, Individually,
and as ADMINISTRATRIX of the
STATE OF DAVID W. MORGAN,
Deceased,

*Plaintiff-Appellant,*

VERSUS

FIRESTONE TIRE AND RUBBER COMPANY,

*Defendant-Appellee.*

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U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
APR 4 1985
SPENCER D. MERCER
CLERK

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**Appeal from the United States District Court for the Southern District of Georgia**

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion March 1, 11 Cir., 1985, ____ F.2d ____).
(April 5, 1985)

Before TJOFLAT and VANCE, Circuit Judges, and ATKINS*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

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*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

**APPENDIX C**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

**No. 84-8569**

---

JOANN H. MORGAN, Individually,
and as ADMINISTRATRIX of the
ESTATE OF DAVID W. MORGAN,
Deceased,

*Plaintiff-Appellant,*

VERSUS

FIRESTONE TIRE AND RUBBER COMPANY,

*Defendant-Appellee.*

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U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
APR 25 1985
SPENCER D. MERCER
CLERK

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**NOTICE OF APPEAL**

COMES NOW Appellant in the above-captioned lawsuit and appeals the denial of her Petition for Re-hearing and Suggestion for Re-hearing En Banc filed on April 4, 1985

in the U.S. Court of Appeals for the Eleventh Circuit. Appellant Joann H. Morgan seeks review of this decision pursuant to 28 USC § 1254(1).

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Supreme Court, U.S.
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No. 85-25

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

JOANN MORGAN,

*Petitioner,*

VS.

FIRESTONE TIRE & RUBBER COMPANY,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

Petitioner filed a diversity products liability lawsuit in 1983 in the U. S. District Court for the Southern District of Georgia, Savannah Division. The lawsuit alleged that a defective tire manufactured by a subsidiary of Respondent was the proximate cause of the death of Petitioner's husband. At trial, Petitioner proceeded on the sole theory of strict liability. R. 8, 53, 345. There was a jury verdict in favor of Respondent and a judgment was entered on that jury verdict. R. 372. The Eleventh Circuit Court of Appeals entered a per curiam decision *without opinion* affirming the judgment in the trial court. The Court of Appeals denied Petitioner's petition for rehearing and suggestion for rehearing en banc.

As in most products liability cases, the trial of the case became a "battle of the experts." The line-up of expert witnesses was as follows:

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| FOR THE PETITIONER: | Laurence Keltner (T. at 180.)<br>Leonard Skolnick (T. at 547.) |
| FOR THE RESPONDENT: | James D. Gardner (T. at 354.) |
| COURT-APPOINTED EXPERT: | Thomas Baker (T. at 479.) |

At trial, Petitioner maintained that the tire in question was defective and that said defectiveness resulted in the death of her husband. R. 3. Respondent maintained that the tire was not defective, but failed due to a long history of under-inflation. T. 43-44. Respondent supported its theory of under-inflation with expert testimony to the effect that the loose cords and pressure grooves found in the tire were evidence of under-inflation. T. 411, 485, 527. In anticipation of this defense, Petitioner put on evidence in her case in chief to the effect that the loose cords and pressure grooves

found in the tire were the result of run-flat damage following the blowout and not under-inflation.[1] T. 240, 244, 256. Thus, the origin of the loose cords and pressure grooves became an issue at trial.

Respondent's expert, Gardner, and the court-appointed expert, Baker, testified that the loose cords and pressure grooves found in the tire could not have been a result of the blowout and run-flat of the tire. T. 382, 411, 494-495. As a basis for their opinion in this regard, Gardner and Baker each testified that they had conducted numerous tests in which they purposely caused the blowout of tires and then examined the damage resulting therefrom. T. 382, 458, 495. A video and test tire from one such test were offered in illustration of Gardner's testimony. T. 253-254, 383, 385. The videotape recorded an out-of-court experiment in which a truck was purposely run over a foreign object so that the object caused the blowout of one of the tires on the truck. The film then showed the blown tire being run flat for a distance of 1200 feet before the truck came to a stop. The videotape did not in any way depict or portray any injury to person or property other than the tire itself. T. 384-385. The film was three to four minutes in length. T. 383. At no point did Respondent maintain that the video or test tire were intended to be a re-enactment of the accident which was the subject of the trial. T. 382-386. Rather, the video and test tire depicted therein were offered to illustrate Gardner's

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[1]In fact, Petitioner's expert proffered photographs of a tire of unknown origin, size, etc. as "illustrative" evidence of the cause of pressure grooves. T. 252-254. That evidence, going to the same issue upon which Respondent's illustrative evidence was later submitted, was allowed in by the trial court over Respondent's objection regarding lack of similarity and before Respondent presented the video and test tire which Petitioner now challenges. Thus, the use of illustrative evidence by the experts was opened by Petitioner herself in the trial.

testimony concerning physical characteristics of blown tires. T. 253-254, 385, 410-411.

Petitioner objected to the admissibility of the video and test tire on the grounds of lack of similarity to the facts in litigation. T. 403. Prior to ruling on the admissibility of the video and test tire, the judge sent the jury out of the courtroom and viewed the video film and heard extensive voir dire examination of all three experts as to the similarities and differences between the test blowout and the blowout on decedent's truck. T. 384-402. Respondent's expert, Gardner, and the court-appointed expert, Baker, both testified that the test blowout and the blowout of the Morgan tire would yield the same physical evidence, or lack thereof, in the tires. It was the opinion of Gardner and Baker that the results of the test blowout would not be affected by variances in the number of cords in the tire, the road conditions present at the blowout, or any other conditions not duplicated in the illustration. T. 384-397, 401-402. Under voir dire by the court, the court-appointed expert said that the video film and test tire would increase the knowledge of the jury in deciding the case. T. 402. On the other hand, Keltner, Petitioner's expert, testified that the experimental blowout would be misleading. T. 397-401.

Thus, there was a dispute between the experts on the evidentiary value of the video and test tire. After studying case law cited to the court by counsel for Petitioner, and after reviewing the film and hearing voir dire examination of the experts, the trial court ruled that the evidence should be admitted. T. 403.

When the jury returned to the courtroom, the court gave contemporaneous cautionary instructions to the jury in which the differences between the illustrative evidence and circumstances of the Morgan blowout were emphasized. T.

404-405. Counsel for Petitioner extensively cross-examined Gardner on the differences between the test evidence and the Morgan blowout in the presence of the jury. T. 460-462. Petitioner also called her own expert in rebuttal to emphasize those differences. T. 539-542. Finally, in its charge to the jury, the court instructed the jurors that they should look to each expert's means of knowledge of the facts to which that expert's testimony related. T. 563.

Petitioner enumerated as error to the Eleventh Circuit Court of Appeals the admission of the video and test tire into evidence. (Petitioner's Brief to the Eleventh Circuit, p. 1). The Circuit Court of Appeals rejected Petitioner's appeal in a per curiam affirmance without opinion. (Brief of Petitioner, Appendix A). The Circuit Court denied Petitioner's petition for rehearing and suggestion for rehearing en banc. (Brief of Petitioner, Appendix B). Petitioner now seeks a writ of certiorari from this Court on the argument that the decision of the Eleventh Circuit conflicts with decisions of other circuits. (Brief of Petitioner, p. 2).

## REASONS FOR DENYING THE WRIT

### I. The Circuit Courts Are Uniform In Their Guidelines For Determining Admissibility Of Out-Of-Court Experiments.

Petitioner alleges conflict among the circuits on the issue of admissibility of out-of-court experiments and then attempts to bootstrap the case *sub judice* to the alleged conflict among the other circuits. (Brief of Petitioner, p. 7). On the contrary, there is no conflict among the circuits in this regard. The circuits rely upon common principles of admissibility in applying their discretion to the facts of each case on this issue.

All of the circuit courts require some degree of similarity before admitting experiments into evidence. The distinction

lies in the degree of similarity required for experiment evidence introduced to illustrate testimony concerning physical principles on the one hand, and for experiment evidence attempting to reconstruct the facts in litigation on the other. *Szeliga vs. General Motors Corporation*, 728 F.2d. 566, 567 (1st Cir., 1984); *Gladhill vs. General Motors Corporation*, 743 F.2d. 1049, 1051 (4th Cir., 1984); *Young vs. Illinois Central Gulf Railroad Company*, 618 F.2d. 332, 338 (5th Cir., 1980); *Nanda vs. Ford Motor Company*, 509 F. 2d. 213, 223 (7th Cir., 1974); *Jackson vs. Fletcher*, 647 F. 2d. 1020, 1027 (10th Cir., 1981). Substantial similarity is required of evidence of prior accidents or out-of-court experiments attempting to re-create the accident in litigation. *Hale v. Firestone Tire & Rubber Company*, 756 F.2d 1322 (8th Cir. 1985); *Gladhill v. General Motors Corp.*, 743 F.2d 1049 (4th Cir. 1983). Some similarity amounting to mere relevance is required of out-of-court experiments offered to illustrate testimony of physical principles. *Szeliga v. General Motors Corp.*, 728 F.2d 566 (1st Cir., 1984). These are the principles which the Circuit Courts of Appeal follow in determining admissibility of experimental evidence. Beyond these principles, "each case must be judged under its own particular facts taking into account the specific purposes for which this type of evidence is submitted." *Szeliga vs. General Motors Corporation*, 728 F. 2d. 566, 567 (1st. Cir. 1984) [quoting *Robbins vs. Whelan*, 653 F. 2d. 47, 49-50 (1st Cir.) cert. denied, 454 U.S. 1123, 102 S.Ct. 972, 71 L. Ed. 2d. 110 (1981)].

Petitioner maintains that some circuits follow these principles of admissibility and other circuits reject them. More particularly, Petitioner maintains that the Circuit Courts of Appeal are inconsistent in requiring similarity before admitting experimental evidence and, secondly, that the appellate courts are inconsistent in recognizing a distinction between

the degree of similarity required for admission of out-of-court experiments offered to illustrate physical principles and the degree of similarity required for admission of out-of-court experiments offered to re-create the accident in litigation. As hereinafter shown, these contentions of conflict among the Circuits are unsupported.

**A. The Appellate Courts Are Consistent As To The Similarity Requirement.**

Petitioner attempts to make out an apparent conflict on the requirement of similarity by comparing two cases on the admissibility of video experiments re-creating the facts in litigation,[2] on the one hand, with a case on the admissibility of a video experiment illustrating physical principles on the other hand.[3] (Brief of Petitioner, pp. 7-9). Petitioner correctly notes that *Hale vs. Firestone Tire and Rubber Company*, 756 F.2d. 1322 (8th Cir., 1985), and *Gladhill vs. General Motors Corp.*, 743 F. 2d. 1049 (4th Cir., 1983), held that there must be substantial similarity between the out-of-court experiments offered in those cases and the facts in litigation. The evidence offered in each of these two cases was all either evidence of prior accidents or evidence amounting to reconstruction of the accidents in litigation.

*Hale* was a products liability action brought against the manufacturer of a tire rim which separated and struck the plaintiff as he attempted to inflate a truck tire. In *Hale* the Eighth Circuit reversed the case on the basis that evidence of two hundred and ten prior truck rim *accidents* had been admitted without a showing that the wheels in those accidents were in substantially the same condition as the wheel

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[2]*Hale vs. Firestone Tire and Rubber Company*, 756 F. 2d. 1322 (8th Cir. 1985); *Gladhill vs. General Motors Corp.*, 743 F.2d. 1049 (4th Cir. 1983).

[3]*Szeliga vs. General Motors Corp.*, 728 F.2d. 566 (1st Cir., 1984).

in the *Hale* litigation. The Eighth Circuit held that "[e]vidence of prior accidents is admissible only if the proponent of the evidence shows that the accidents occurred under circumstances substantially similar to those at issue in the case at bar." *Id.* at 1332. Respondents submit that this ruling is certainly in keeping with the general rules of admissibility requiring substantial similarity for out-of-court experiments re-creating accidents and for evidence of prior accidents.

Also before the Eighth Circuit in *Hale* was the question of whether a motion picture film depicting a tire rim accident had been improperly admitted into evidence in the trial court. The film depicted a man inflating a tire, an explosive separation of the tire, and a mannequin struck by the exploding parts. The life-like mannequin was hurled into the air by the explosion and "killed." Thus, evidence of a graphically violent staged accident had been admitted into evidence without substantial similarity. The Eighth Circuit found that the "admission of the film graphically depicting a dissimilar explosive accident and its severe consequences" was error. *Id.* at 1333.

Petitioner is also correct that *Gladhill vs. General Motors Corp.*, 743 F. 2d. 1049 (4th. Cir., 1984), required reversal where there was no showing of substantial similarity between the events depicted in a video film and the events in litigation. However, here again the court was "persuaded that this entire test goes well beyond a mere demonstration of a physical principle" and the court went on to side with the plaintiffs who contended "that this test amounted to a reenactment of the accident." *Id.* at 1051.

Thus, *Hale* and *Gladhill* follow the general rule of requiring substantial similarity for evidence of out-of-court experiments re-creating accidents and for evidence of prior acci-

dents. On the other hand, the requirement of similarity is diluted to what amounts to a test of relevancy in cases such as the one *sub judice* where the evidence is offered for purposes of demonstrating physical principles. Petitioner clouds this distinction in her brief by comparing the similarity requirements of *Hale* and *Gladhill* with the relevance requirements in *Szeliga vs. General Motors Corp.*, 728 F. 2d. 566, 567 (1st. Cir., 1984).

Petitioner further seeks to make the circuits seem at odds on requiring similarity by representing *Szeliga* as holding that similarity is not to be considered at all in determining the admissibility of out-of-court experiments. (Brief of Petitioner, p. 9). *Szeliga* does not so hold. The First Circuit clearly held that the films in issue in *Szeliga* were not a recreation or representation of how the accident happened but were offered to illustrate an expert's testimony.[4] The issue in *Szeliga* therefore became whether or not the films were relevant to the case. In affirming the admissibility of the films, the Eighth Circuit noted that the district court had screened the films and conducted extensive voir dire of the experts before admitting the films into evidence. *Id.* at 567. Thus, it is clear the trial court determined that the films addressed the issues in litigation and were therefore relevant. *Id.* at 567.

Petitioner misrepresents *Szeliga* by taking one sentence in the opinion out of context. That sentence is as follows: "[d]issimilarities between experimental and actual conditions affect the weight of the evidence, not its admissibility." *Id.* at 567. (Brief of Petitioner, p. 9). Read in context of the opinion, this sentence does not say that similarity is not an

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[4]Incidentally, the facts of *Szeliga* and the nature of the films in issue in that case surprisingly parallel the facts and video film in the case *sub judice*.

issue affecting admissibility, but says that once some similarity of conditions is shown, dissimilarities of other conditions will affect the weight of the evidence and not its admissibility. *Id.*

In searching for a conflict among circuits, Petitioner ignores the distinction between illustrative evidence and accident reconstruction evidence and incorrectly represents the "illustrative evidence" cases as saying that similarity has no bearing on admissibility.

### B. The Appellate Courts Consistently Recognize The Distinction Between Accident Reconstruction Evidence And Illustrative Evidence In Applying Admissibility Requirements.

In a closely-related but distinct argument, Petitioner maintains that some Circuit Courts of Appeal do not recognize a distinction between the similarity requirements for accident reconstruction evidence and the similarity requirements for admitting illustrative evidence. (Brief of Petitioner, p. 11-12). This contention is totally unsupported by the case law. All Circuit Courts that have passed on the issue recognize the distinction. *Szeliga v. General Motors Corp*, 728 F.2d 566, 567 (1st Cir., 1984); *Gladhill v. General Motors Corp*, 743 F.2d 1049, 1051 (4th Cir., 1984); *Young v. Illinois Central Gulf RR Co.*, 618 F.2d 332, 338 (5th Cir., 1980); *Nanda v. Ford Motor Company*, 509 F.2d 213, 223 (7th Cir., 1974); *Ramseyer v. General Motors Corporation*, 417 F.2d 859, 864 (8th Cir., 1969); *Jackson v. Fletcher*, 647 F.2d 1020, 1027 (10th Cir., 1981).

Petitioner cites two cases as refusing to follow the generally accepted dichotomy between illustrative evidence and evidence re-creating the facts in litigation: *Gladhill v. General Motors Corp.*, 743 F.2d 1049 (4th Cir., 1983), and *Hale v. Firestone Tire & Rubber Company*, 756 F.2d 1322 (8th Cir.,

1985). (Brief of Petitioner, p. 12). Petitioner's representation of these cases as rejecting the dichotomy is completely inconsistent with the opinions themselves.

In *Gladhill*, the plaintiffs appealed contending that a video film put into evidence at trial by the defendant amounted to a re-enactment of the accident without being substantially similar to the accident. The defendants argued that the video did not portray a re-enactment but rather demonstrated physical principles underlying their expert's testimony. *Id.* at 1051. Thus, the issue on appeal was not whether the dichotomy existed but was whether the evidence introduced at trial was merely illustrative or amounted to a re-enactment of the accident. The Fourth Circuit Court of Appeal clearly recognized the dichotomy when it held as follows: "[d]efendants are correct that demonstrations of experiments used to illustrate the principles used in forming an expert opinion are not always required to adhere strictly to the circumstances of the events at issue in the trial. *Brandt v. French*, 638 F.2d 209, 212 (10th Cir., 1981)." *Id.* at 1051.[5] The Gladhill court went on to rule against the defendants on the basis that the video evidence in that case went "well beyond a mere demonstration of a physical principle." *Id.* at 1051. The *Gladhill* decision was made on the basis that the evidence in issue was better categorized as a re-enactment than as illustrative evidence and not on the basis that there is no distinction in similarity requirements for the two. *Id.* at 1051-1052.

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[5]The case relied on by the Fourth Circuit in *Gladhill* in recognizing the distinction in similarity requirements for reconstruction evidence and illustrative evidence, *Brandt v. French*, 638 F.2d 209 (10th Cir., 1981), clearly recognizes the distinction when it says that "demonstrations of experiments used to merely illustrate the principles in forming an expert opinion do not require strict adherence to the facts." *Id.* at 212.

Nor does *Hale* refuse to recognize the dichotomy as argued by Petitioner. (Brief of Petitioner, pp. 11-12). As discussed in detail above, *Hale* involved the admission of "compelling" evidence of numerous other *accidents*, some of them involving fatalities, and a film "graphically depicting a dissimilar explosive accident." *Id.* at 1332, 1333 (Emphasis supplied). In ruling that the prior accidents and film of the simulated accident were improperly admitted, the Eighth Circuit was in keeping with the dichotomy preventing admission of such evidence when lacking in substantial similarity with the facts in litigation. Petitioner cites general language quoted by the *Hale* court to the effect that substantial similarity is required for experimental tests as authority for Petitioner's position that *Hale* refuses to recognize the dichotomy. In doing so, Petitioner is totally disregarding the context of the *Hale* opinion. The language relied upon by Petitioner, when read in context, is directed to experimental evidence of prior or reconstructed accidents and not to experimental evidence in general.

The Hale court made its recognition of the dichotomy between re-creation evidence and illustrative evidence perfectly clear when it decided the case of *Randall v. Warnaco, Inc., Hirsch-Wise Division*, 677 F.2d 1226, 1233-1234 (8th Cir., 1982). Petitioner concedes that *Randall* recognizes the dichotomy, but maintains that the Eighth Circuit reversed its position in deciding *Hale*. (Brief of Petitioner, p. 11). To the contrary, it is clear from a full reading of *Hale* that the case was decided on the facts and not on a new theory of admissibility. *Id.* at 1332-1333. In fact, not only does *Hale* not in any way overturn or criticize *Randall*, but the cases rely upon common authority for their decisions. *Hale*, 756 F.2d at 1333; *Randall*, 677 F.2d at 1233.

**C. Only Petitioner Finds Conflict Among The Circuits.**

Petitioner maintains there is conflict among the circuits as to this evidentiary question. Yet, in not one of the cases

relied upon by either Petitioner or Respondent does a circuit court reject or even critize another circuit court opinion. It is only Petitioner who finds a conflict among circuits.

**II. The Eleventh Circuit's Per Curiam Affirmance Without Opinion Does Not Conflict With Decisions Of Other Circuits.**

The Eleventh Circuit Court of Appeals issued a per curiam affirmance without opinion of the trial court's judgment in the case *sub judice*. Thus, the court's reasons for affirming are not available. Even Petitioner admits "[t]he Eleventh Circuit has not articulated its rule" as to similarity requirements for out-of-court experiments. (Brief of Petitioner, P. 12).

The lack of a published opinion by the appellate court is particularly significant in light of the manner in which the trial court approached the question of admissibility of the out-of-court experiment. Petitioner would apparently have this Court believe the trial court refused to recognize similarity as a factor determining admissibility and that the Eleventh Circuit's affirmance effectively so held. To the contrary, as shown in detail in the Statement of the Case, *supra*, before ruling that the video film and test tire would be admitted, the trial judge viewed the video film in question and heard extensive voir dire of the experts concerning similarities and the relevance of dissimilarities between the out-of-court experiment and the facts in litigation. Thus, it is clear that the trial court did consider similarity in ruling on the admissibility of the out-of-court experiment. Yet Petitioner now maintains the effect of the appellate court's affirmance without opinion is to say that similarity is not an issue in determining admissibility.[6]

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[6]It is interesting to note Petitioner in her brief to the circuit court argued that the Eleventh Circuit requires similarity between out-of-

The per curiam affirmance without opinion by the Eleventh Circuit in this case does not decide whether similarity is required in the Eleventh Circuit since that issue was not enumerated on appeal from the trial court. (Petitioner's Brief to the Eleventh Circuit, p. 28). In a procedurally analogous case, *NLRB v. Sears, Roebuck & Company*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975), this Court declined to consider an issue where the Court of Appeals had affirmed without opinion and it was not clear whether the Court of Appeals had passed on the issue. *Id.* 421 U.S. at 163-164, 44 L.Ed.2d at 54-55. *See also, Ramsey v. United Mine Workers of America*, 401 U.S. 302, 312, 91 S.Ct. 658, 28 L.Ed.2d 64, 71-72 (1971).

As outlined in the Statement of the Case, *supra*, the evidence in issue in the case *sub judice* was admitted for purposes of illustrating the testimony of Respondent's expert. T. 253-254, 383, 385. The video tape simply showed the puncture of a truck tire by a foreign object and the run flat of that tire for a distance of 1,200 feet. The video tape did not in any way depict or portray any injury to person or property other than the tire itself. T. 384-385. The video and test tire depicted therein were offered to illustrate the testimony of the Respondent's expert that he had conducted numerous tests on the physical effects that blowouts have on tires. T. 382, 458, 495. Under these facts, the video and test tire were offered for illustrative purposes and the test for ad-

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court experiments and facts in litigation. (Petitioner's brief to Eleventh Circuit, P. 28). Where, as here, the issue presented to the Eleventh Circuit was whether the evidence met the test of similarity rather than whether similarity was required, it certainly cannot be said that a per curiam affirmance without opinion had the effect of abolishing the requirement of similarity. Yet, in an apparent attempt to "create" a conflict among circuits, Petitioner now argues that the Eleventh Circuit does not require similarity. (Brief of Petitioner, p. 9).

missibility was whether there was some similarity such as would make the evidence relevant. *Szeliga v. General Motors Corporation*, 728 F.2d 566, 567 (1st Cir., 1984). Prior to ruling on the admissibility of the video and test tire, the trial judge sent the jury out of the courtroom and viewed the video film and heard extensive voir dire examination of all three experts as to the similarities and differences between the test blowout and the blowout on decedent's truck. T. 384-402. Relying on the screening of the film and the voir dire testimony on the question of similarity, the trial court overruled Petitioner's lack of similarity objection and instructed that counsel for Petitioner could cross-examine on dissimilarities. T. 402-403. This decision was in complete keeping with *Szeliga, supra; Ramseyer v. General Motors Corporation*, 417 F.2d 859 (8th Cir., 1969); *Young v. Illinois Central Gulf RR Company*, 618 F.2d 332 (5th Cir., 1980); and all other decisions of the circuit courts on the admissibility of illustrative evidence.

### III. Admissibility Of Out-Of-Court Experiments Is A Subject For The Broad Discretion Of Trial Courts.

Petitioner argues that Federal Rules of Evidence 401 and 402 (requiring relevancy) and Federal Rule of Evidence 403 (granting the trial court discretion to exclude evidence where the probative value is substantially outweighed by dangers of unfair prejudice, etc.) have received various and conflicting interpretations from the circuits regarding the admissibility of evidence of out-of-court experiments. (Brief of Petitioner, p. 10). In answer, Respondent first notes that the trial courts have broad discretion in ruling on relevance and admissibility of evidence. *Collins, by and through Kay v. Seaboard Coastline RR Company*, 675 F.2d 1185, 1196-97 (11th Cir., 1982); *United States v. 110 Bars of Silver, 3 Crucibles of Silver, 11 Bags of Silver Coins*, 508 F.2d 799

(5th Cir.), cert. denied sub nom. *Resnick v. United States*, 423 U.S. 861, 96 S.Ct. 118, 46 L.Ed.2d 89 (1975).

As to the Rule 403 issue in particular, the Rule does not confer upon a party a right to exclude evidence. Instead, the Rule is a grant of discretion to the trial court. Wright & Graham, *Federal Practice and Procedure, Evidence*, § § 5212, 5224, pp. 251, 252, 319. As originally proposed, the Rule required exclusion of relevant evidence found to be substantially outweighed by the danger of unfair prejudice, but as finally enacted the Rule provided that the trial court "may" in its discretion exclude such evidence substantially outweighed by danger of unfair prejudice. 1 Weinstein & Berger, *Weinstein's Evidence*, § 403; *Dent v. Riddle*, 664 F.2d 1, 5 (1st Cir., 1981); *United States v. Long*, 574 F.2d 761, 767 (3rd Cir., 1978). Thus it is precisely when probative value is actually substantially outweighed by danger of unfair prejudice that the trial judge's discretion comes into play. Wright & Graham, *Federal Practice and Procedure, Evidence*, § 5214. And then, "the general rule is that the balance should be struck in favor of admission." *United States v. Day*, 591 F.2d 861, 878 (D.C. Cir., 1978). *See also*, Graham, *Handbook of Federal Evidence*, 1984 pocket part, § 403.1, n. 8.5, pp. 38-39.

As an exercise of discretion, a trial judge's ruling under Rule 403 may be reversed only if there was a clear abuse of discretion. *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147 (5th Cir., 1981); *United States v. Adcock*, 651 F.2d 338, 343 (5th Cir., 1981); *United States v. Blevinal*, 607 F.2d 1124, 1128 (5th Cir., 1979); *United States v. Authement*, 607 F.2d 1129, 1131 (5th Cir., 1979). *See also, United States v. Robinson*,560 F.2d 507 (2nd Cir., 1977) (affirm unless trial judge acts "arbitrarily and irrationally").

As for the admissibility of out-of-court experiments in particular, that determination is one for the sound and broad discretion of the trial courts. *Szeliga v. General Motors Corporation*, 728 F.2d 566, 567 (1st Cir., 1984); *Millers' National Insurance Company, Chicago, Illinois v. Witchita Flour Mills Company*, 257 F.2d 93, 99 (10th Cir., 1958); *Johnson v. William C. Ellis & Sons Iron Works*, 604 F.2d 950, 958 (5th Cir., 1979). "Each case must be judged under its own particular facts taking into account the specific purposes for which this type of evidence is submitted."*Robbins v. Whelan*, 653 F.2d 47, 49-50 (1st Cir.) cert. denied, 454 U.S. 1123, 102 S.Ct. 972, 71 L.Ed.2d 110 (1981); *Szeliga v. General Motors Corp.*, 728 F.2d 566, 567 (1st Cir., 1984). In arguing that a conflict among circuits exists, Petitioner fails to note the particular facts on which the cases upon which she relies were decided. Rather, Petitioner generalizes the holdings of those cases in seeking to discover a conflict among circuits.

## CONCLUSION

There is no conflict among the United States Circuit Courts of Appeal on the requirements of similarity in admitting evidence of out-of-court experiments. While the similarity requirement does vary with the nature of the out-of-court experiment sought to be admitted, the circuit courts are uniform in recognizing this.

It would be an overwhelming task for the United States Supreme Court to attempt to review *discretionary* evidentiary matters in the district courts of this country. The petition should be denied and this litigation brought to an end.

Respectfully submitted,

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